No. 22319

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELIZABETH ELAINE CRAIG, Administratrix of the Estate of ROBERT J. CRAIG, deceased,

Appellant,

vs.

THE UNITED STATES OF AMERICA, *et al.*,

Appellees.

On Appeal From the United States District Court for the Southern District of California. Appellee: Litton Systems, Inc.

APPELLEE'S BRIEF.

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Statement of the Case.

On August 16, 1965 Libellant filed her libel pursuant to the provisions of the Death on the High Seas Act, Title 46, U.S.C., Secs. 761-768. Therein it is alleged that on August 19, 1963 Libellant's husband, a member of the U.S. Navy, died while attempting to land his airplane aboard the U.S.S. Constellation. She further alleges that the causes of the incident were negligence of the respondents and defects in the arresting gear equipment of the vessel [Clk. Tr. pp. 2-7].

The caption of the libel named five respondents by proper name, but included also respondents designated as "Does I through X" [Clk. Tr. p. 2].

The statute of limitations for actions filed under the Death on the High Seas Act is two years from the date of death. Title 46 U.S.C. Sec. 763; *Meuser v. Rutledge* (1962 S.D.N.Y.), 205 Fed. Supp. 208. The period thus expired August 19, 1965.

Service of an alias citation and copy of the libel upon Appellee Litton Systems, Inc., as "Doe I", was made on February 28, 1966 [Clk. Tr. p. 13]. Libellant does not contend that Litton had notice of the pendency of this action prior to service [Clk. Tr. p. 93, lines 2-4]. Further, Litton did not undertake investigative procedures with reference to the merits of this action until after such service, which occurred more than six months following the running of the statute of limitations [Clk. Tr. pp. 70-71].

Litton appeared specially, contending that in the light of the record, the alias citation was issued prematurely and that Litton had not properly been brought before the Court [Clk. Tr. pp. 16-21 and 28-29]. The Court sustained Litton's position [Clk. Tr. p. 30]. It ordered that Libellant move the Court to amend the libel to place Litton before the Court [Rep. Tr. p. 8, lines 2-14]. It further ordered, to save separate hearings, that Litton's exceptions to the proposed amended libel be heard at the same time [Rep. Tr. p. 4, lines 13-21; p. 6, lines 10-15; p. 9, lines 2-6].

On November 16, 1966 Libellant filed the motion to amend her libel to add Litton as a respondent. The motion was filed pursuant to Rule 15 of the F. R. Civ. P.

[Clk. Tr. pp. 31-32]. The motion and exceptions were heard December 29, 1966 [Rep. Tr. pp. 10-39].

Subsequently, the Court filed its Memorandum of Decision and therein denied Libellant's motion to amend to add Litton as a party respondent [Clk. Tr. pp. 91-93]. The basis of the Court's ruling was that Libellant failed to show that Litton was on notice of the pendency of the action prior to service of the citation on February 28, 1966 and that Litton had a right to rely upon the running of the statute of limitations. It held, consequently, that an amendment could not be made under Rule 15(c), F. R. Civ. P. so as to "relate back" to the time the original libel was filed so as to obviate the effect of the statute of limitations [Clk. Tr. pp. 91-93].

This appeal followed.

The question on appeal is, basically, whether the Trial Court was guilty of an abuse of discretion in refusing to allow the amendment. The subsidiary question is, under the circumstances of the case, whether the requirements of Rule 15(c) had been satisfied so as to obviate the operation of the state of limitations. The Court did not base its holding on the propriety of fictitious "Doe" defendants in an admiralty action, so that subject is here only a collateral inquiry as it relates to the holding of the Court.

ARGUMENT.

I.

The Court Did Not Abuse Its Discretion in Refusing to Allow the Amendment.

This Court has many times held that the determination as to whether to allow or refuse an amendment to a pleading is wholly within the discretion of the Trial Court. The Trial Court's holding will be disturbed on appeal only upon a showing of abuse of discretion. *C. E. Stevens Co. v. Foster & Kleiser* (1940 9 C.A.), 109 F. 2d 764, rev'd on other grounds, 311 U.S. 255; *Hancock Oil Co. v. Universal Oil Prods. Co.* (1941 9 C.A.), 120 F. 2d 959.

The rule in admiralty cases is the same. "The whole subject rests entirely in the discretion of the court . . ." 2 Benedict on Admiralty (6th Ed. 1940), Sec. 355, pp. 559-560. See also *U.S. Fidelity and Guaranty Co. v. United States* (1945 S.D.N.Y.), 63 Fed. Supp. 114, 1945 A.M.C. 747.

Rule 15(c) of the F. R. Civ. P. provides, as here pertinent, as follows:

> "(c) RELATION BACK OF AMENDMENTS. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. *An amendment changing the party against whom a claim is asserted relates back* if the foregoing provision is satisfied *and within the period provided by law for commencing the action against him, the party to be brought in by amendment*

> *(1) has received such notice of the institution of the action* that he will not be prejudiced in maintaining his defense on the merits, and (2) *knew* or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him. . . ." (emphasis provided).

The provisions of the rule as apply to change of parties was not added until July 1, 1966. But courts had long before recognized that a party to be added after the running of the statute of limitations need have sufficient notice of the suit so as to prevent prejudice. The amendment to Rule 15(c) simply "clarifies" the law which pre-existed the change. *Cone v. Shunka* (1966 W.D. Wisc.), 40 F.R.D. 12.

This Court has cited notice of the pendency of the action as being a "controlling consideration" as to whether a change or substitution can be made as to a party. *Goodrich v. England* (1958 9 C.A.), 262 F. 2d 298, 301.

In the case at bar, there was no notice to Litton that this action existed until two years and six months after the accident had occurred, and this was six months following the running of the statute of limitations. No investigatory work was instituted as to Mrs. Craig's case until that time [Clk. Tr. pp. 70-71]. Appellant claims that no prejudice would result to Litton if the amendment were allowed by virtue of the fact that an investigation had been undertaken with reference to an action pending in New York which arose from the same incident. That action is by a seaman aboard the vessel who sustained injuries—not death (See Appellant's Op. Br. p. 16).

This claim is unsound. The instant case involves the death of the pilot of the airplane and the prayer for damages is $750,000.00—not an insubstantial sum. Contributory negligence is an issue in a case based on the Death on the High Seas Act. 46 U.S.C. Sec. 766. Investigation of the accident as pertains to this action would necessarily encompass all acts and omissions of the deceased pilot whose widow is Libellant. It does not follow that investigation of one claim constitutes investigation of another. Rule 15(c) specifically states that a showing must be made that the party sought to be included in the action had notice of "institution of *the* action" (emphasis provided) within the statutory period. This showing is not made. The Trial Court exercised its broad discretion and refused to permit the amendment. It cannot be said that its exercise of discretion was unsound. Certainly it cannot be said that the discretion was abused so as to justify reversal on appeal.

II.

The Applicability of Rule 15(c) Is Clear.

Libellant seeks to avoid the provisions of Rule 15(c) by contending that it is not applicable to the amendment sought. She so contends on various grounds.

A. Amendment to Substitute a Party as "Doe I" Is Not an Amendment to Correct a Misnomer.

First, she cites Professor Moore's volumes (see Appellant's Op. Br. pp. 15-16) for the proposition that an amendment to substitute Litton as "Doe I" is not a "changing" of a party within the wording of Rule 15(c). But a reading of the cases cited by Professor Moore in his footnotes reveals that he refers only to

amendments to correct *misnomers* in the name of parties defendant.

Those cases are found respectively at 274 F. 2d 743, 97 F. Supp. 505, 287 F. 2d 95, 217 F. 2d 27 and 91 F. Supp. 652. In all these cases it is found that the defendant as named in the complaint was named in words very similar to his true name. More important, in each of the cases, the real defendant had notice of the pendency of the action. Correction of misnomers has been properly allowed by courts for many years. But "Doe I" assuredly is not a misnomer for Litton Systems, Inc.

B. Propriety of Fictitious "Doe" Respondents.

Second, she contends that the use of fictitious "Doe" respondents is proper in admiralty. Extending this argument, she contends that "Doe I" and Litton are one in the same and that since "Doe I" was sued before the running of the statute of limitations, so was Litton. She seeks to avoid characterizing the bringing of Litton into the case as a substitution of a party or as the addition of a new party. She thus contends that no "change" is made within the provisions of Rule 15(c). Yet it can only be such. The anonymity of "Doe I" is patent, and it remained such until six months after the statute had run.

The propriety of use of fictitious defendants in Federal cases—both in diversity cases and in cases founded upon a Federal law—is questionable at best. Further, if the device is to be permitted it should not operate so as to abrogate well established law requiring that a defendant be given seasonable notice that he is being sued.

Libellant relies entirely upon a District Court case decided in 1955, *Phillips v. The United States* (1955 N.D. Cal. So. Div.), 127 F. Supp. 12. Subsequent to that decision, higher courts and other District Courts have held to the contrary on the utilization of fictitious defendants. In 1959, this Court heard a case filed under the Civil Rights Act. *Hoffman v. Halden* (1959 9 C.A.), 268 F. 2d 280. As here, "Doe" defendants were named in the caption of the action. After the Statute of Limitations had run, the plaintiff attempted to add two party defendants to the action, and relied on the "relation back" provision of Rule 15(c) of the Federal Rules of Civil Procedure. The Court stated, at page 304:

> ". . . but where new defendants are brought into the action, *without previous notice or service of process,* a different situation exists. This is like the institution of a *new action* against the *new parties.*" (Emphasis provided).

The Court declined to invoke the "relation back" doctrine and the action was dismissed as to the two new parties.

In a diversity case this Court made a general comment on the use of fictitious defendants in Federal Courts.

> "This attempt to join fictitious defendants is said to be justified in California practice. However that may be, no one of the Rules of Civil Procedure under which Federal Courts operate gives warrant for the use of such a device." *Molnar v. National Broadcasting Company* (1956 9 C.A.), 231 F. 2d 684, 687.

Sigurdson v. Del Guerico (1956 9 C.A.), 241 F. 2d 480, 482, was based on a Federal law—not on diversity —and fictitious defendants were held improper and were characterized as "dangerous". The Court may well have had in mind the importance of notice to a potential defendant. Other cases holding fictitious defendants improper are *Roth v. Davis* (1956 9 C.A.), 231 F. 2d 681, *Glucksman v. Columbia Broadcasting System* (1963 S.D. Cal.), 219 F. Supp. 767, 768, and *Phillip v. Sam Finley Inc.* (1967 W.D. Va.), 270 F. Supp. 292. In the latter case, the complaint named "Doe defendants" and after the statute had run, plaintiff attempted to amend to substitute new parties for the fictitious defendants. The Court, in granting a motion for summary judgment, stated, in substance, that the plaintiff's use of fictitious defendants does not create a new right to freely amend. The burden of finding the proper defendant is on the plaintiff and the plaintiff cannot toll the statute of limitations by filing against some fictitional character. The Court found that it could not permit an amendment to relate back when such would materially affect a substantial right of the defendant—in this instance the right to rely upon the running of the statute of limitations.

C. The Trial Court Was Correct in Holding That Failure to Show Notice, Pursuant to Rule 15(C), Is Fatal to the Proposed Amendment.

The following will assume, for purposes of argument only, that fictitious defendants may be used in admirality, subject to important limitations.

It has been shown that Federal Courts view the use of fictitious defendants with disfavor. In view of this, it is only fair and just that well established principles

—designed to protect unwary defendants—be invoked where fictitious defendants are used in a pleading.

The right of a defendant to rely upon the running of the statute of limitations is a substantial right. *Phillip v. Sam Finley Inc., supra.* In the instant case, Litton had the right to assume that Libellant would be satisfied with her widow's pension from the United States and that it would not be sued. It had no notice whatever, within the period of the statute, that it would be called upon to defend in this action.

It is firmly established in law that a person has the right to rely upon the running of the statute of limitations so long as he has no notice that he is being sued in the action. In *Hoffman v. Halden, supra,* the Court states at page 304:

> ". . . were defendants Wair and Hansen sufficiently apprized of the pendency of *the action* so as to prevent their reliance on the applicable Statute of Limitations? There is nothing in the record to so indicate." (emphasis provided).

Notice to the defendant of the pendency of the action within the statutory period has been characterized as being the "paramount issue" in allowing or refusing an amendment after the statute has run. *DeFranco v. United States* (1955 S.D. Cal.), 18 F.R.D. 156. In that case, the Court discusses in detail the importance of notice to a defendant, as seen by Federal Courts.

Before the amendment to Rule 15(c), courts refused to permit amendment after the statutory period where notice was not shown to have been received within the period. See *United States v. Western Cas. and Surety Co.* (1966 6 C.A.), 359 F. 2d 521, *Cone v. Shunka,*

supra, Martz v. Miller Brothers Company (1965 D.C. Del.), 244 F. Supp. 246, *Aarhus Oliefabrik, A/S v. A. O. Smith Corp'n.* (1958 E.D. Wisc.), 22 F.R.D. 33, and *United States v Templeton* (1961 D.C. Tenn.), 199 F. Supp. 179. It should be noted that in the *Western, Cone* and *Martz* cases, it could easily be implied that the new defendant probably did have notice. Nevertheless, the courts refused amendment because of failure to show same.

Because of the established law, when the 1966 addition was made to Rule 15(c), it was only natural and consistent to adopt the period of the statute of limitations as the yardstick to measure the period within which notice must be received. The new rule has been applied since the change. *Burns v. Turner Const. Co.* (1967 D.C. Mass.), 265 F. Supp. 768.

Plaintiff contends that Rule 15(c) defeats the purpose of the statute of limitations and makes it a statute of discovery and not one of limitation. First, Appellee respectfully submits that the two are entirely in harmony. The rights of a defendant, say the cases, are keyed to notice. In a case such as this, he must have same within two years of the incident. If he has such notice, he can be brought into the case after the statute has run.

Libellant would characterize the statute of limitations as a weapon in her cause to utilize "Doe defendants" in the way she seeks. She then says Rule 15-(c) blunts her weapon. But the statute of limitations certainly is not designed to promote the cause of plaintiffs against "Doe defendants." Rather, its purpose is akin to the "notice" requirement of Rule 15(c)—to give the defendant some protection.

Nor does the "notice" requirement vitiate "Doe" pleadings. An action can be filed, *e.g.,* a few months after an accident. The "Doe defendant" can be brought in by amendment after the statute has run. But the all-important notice—judicially established long before the amendment of Rule 15(c)—must have been received.

Nor does it, as contended, change the statute of limitations into a "statute of discovery". An action may be filed shortly following an accident and discovery immediately instituted. Through discovery, a potential defendant will ordinarily discover the pendency of the action. If he does so, he can be included in the case even after the statute has run.

Libellant seems to view this case with only an eye to the long perpetuation of the rights of a plaintiff. In so doing, she overlooks the fact that a defendant must also have rights, and that the courts have long so held.

Libellant states (Appellant's Op. Br. p. 5) that she could not possibly have known the identities of all defendants within two years of her husband's death. But she fails to show why she could not have promptly filed the action and, through discovery, have determined all proper defendants within, for example, *one* year of the accident. She cites the complicated nature of the circumstances through which the accident occurred. Yet a defendant must have the same protection in a complicated case as he would have in simper litigation. A defendant should not be penalized for lack of diligence on the part of a plaintiff. The record fails to show any reason why the action was not filed earlier. It further shows no formal discovery whatever.

It was shown to the Trial Court that in California State courts, "Doe" pleading is permitted and no notice of the pendency of the action need be given within the period of limitation [Rep. Tr. p. 31, line 22, to p. 32, line 16]. As has been seen, Federal courts have instituted the additional requirement of notice to a defendant.

While at first blush, this may seem unduly harsh upon a plaintiff who brings an action in a U. S. District Court under a federal law, a consideration of the differing statutes of limitation shows the wisdom of the additional "federal" requirement.

Under California law, all actions for personal injury or death must be filed within *one year* of the accident. *Calif. Code of Civ. Procedure,* Sec. 340.3. The one year period of limitations is not only applicable to negligence actions, but also is applicable in those founded upon breach of warranty. *Rubino v. Utah Canning Co.* (1954), 123 Cal. App. 2d 18, 266 P. 2d 163.

Under federal laws governing actions for personal injury and death, however, much longer periods are provided for the filing of actions. See, for example, the Jones Act and the F.E.L.A., wherein the period is three years. 46 U.S.C.A., Sec. 688; 45 U.S.C.A., Sec. 56; *Engel v. Davenport* (1926), 271 U.S. 33, 46 S. Ct. 410, 70 L. Ed. 813. The Tort Claims Act has a two year Statute of Limitations. 28 U.S.C.A., Sec. 2401(b). The same period is here applicable under the Death on the High Seas Act.

Accordingly, it can be seen that, with longer periods applicable, a defendant needs some protection from claims as to which he may be "kept in the dark" for an extended time. It is submitted that the "notice" re-

quirement, not applicable under California law, is a fair proposition.

Libellant also contends that if leave to sue Litton is not granted, she is foreclosed from suing any other proper party not named in the caption. This is not necessarily true. It may be that all proper respondents had notice of the pendency of this action within the two year period, whereas Litton did not. There is no showing one way or the other on this subject. If they had such notice, they can be sued.

Libellant implies that the "notice" requirement of Rule 15(c), is satisfied if, within the statutory period, the respondent has notice of the *incident* which gave rise to the cause of action, and that notice of the pendency of the action itself is not necessary (See Appellant's Op. Br. p. 16). She made this contention before the Trial Court, citing cases which were alleged to support that proposition [Clk. Tr. pp. 73-75]. The Trial Court properly found that none of those cases supports that position. In them, either no new defendants were sought to be added, or else the defendant had notice of the *action* within the period [Clk. Tr. p. 93, lines 5-20].

To the contrary, the courts have consistently held that notice of the *action* is required. See *Hoffman v. Halden, supra, United States v. Travelers Insurance Co.* (1966 D.C. Colo.), 40 F.R.D. 316, *United States v. Western Cas. and Surety Co., supra, Cone v. Shunka, supra, Martz v. Miller Brothers Company, supra, Aarhus Oliefabrik, A/S v. A. O. Smith Corp'n., supra, United States v. Templeton, supra,* and *DeFranco v. United States, supra.*

In *Barron and Holtzoff, Federal Practice* and *Procedure,* Vol. 1-A, Ch. 7, Sec. 448 at pages 768-769 it is stated:

> "While amendments are often permitted to bring in additional parties, and the utmost liberality is exercised to correct a misnomer, if the effect of a proposed amendment is not merely to correct a misnomer but to substitute a new party for the one already named, the amendment amounts to a new and independent cause of action which cannot be permitted if the Statute of Limitations has run."

As the Trial Court wisely stated:

> "It is one thing to know of an occurrence which may give rise to a lawsuit, another to know you are being sued." [Clk. Tr. p. 93, lines 23-25].

D. Serving a Party Sued as a "Doe" Cannot Be Characterized as Simply "Designating a Party" Already Sued. Such Party Can Only Be Seen as a New, or Substituted Party. Such Parties Cannot Be Included Unless They Had Notice Within the Statutory Period.

The "Doe defendants" as named in the caption are obviously not real persons. They are expressly designated as "fictitious" [Clk. Tr. p. 3, line 9]. Only upon service of the citation did Litton emerge as a possible party defendant. Under the law, plaintiff did not seek to give it such status until she filed to amend on November 16, 1966. It is thus a new party to the action, or one to be substituted by amendment for one of the "Doe defendants".

As stated in *Hoffman v. Halden, supra,* at page 304:

> ". . . this is like the institution of a new action against the new parties."

It has also been held that where the defendant named in the original complaint is a non-existent agency, the proper party defendant cannot be substituted for it after the statutory period. *Cohn v. Federal Security Administration* (1961 W.D.N.Y.), 199 F. Supp. 884.

To further demonstrate that such are new parties, it is noted that an amendment of the pleadings is necessary to set forth the name of the new party. Admiralty Rule 23 provides that amendments shall be made on motion to the Court. Local Rule 104, Admiralty Rules, So. District Calif., required petition and notice to add or substitute a party. The analogous rule under the Federal Rules of Civil Procedure is Rule 21. Under this Rule, it has been held that an order of Court, pursuant to motion therefor, is necessary to change or to substitute a party. *Pacific Gas & Electric Company v. Fibreboard Products, Inc.* (1953 N.D. Cal.), 116 F. Supp. 377, 382, *National Maritime Union of America v. Curran* (1949 S.D.N.Y.), 87 F. Supp. 423.

In California, a state permitting the use of fictitious defendants, an amendment is likewise necessary. Calif. Code of Civ. Proc. Sec. 474.

Thus, the provisions of Rule 15(c), pertaining to amendment to change a party (and requiring notice) is clearly called into play.

In passing, it should perhaps be noted that plaintiff claims (the same not being admitted) that Litton is the successor of one of the named defendants. But successors in title or interest cannot be added after the statute of limitations has run. *United States v. Norris* (1915 8 C.A.), 222 Fed. 14, *O'Neill v. American Radiator Co.* (1942 D.C.N.Y.), 43 F. Supp. 543.

Conclusion.

The Trial Court did not abuse its discretion in refusing the amendment. Its order should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with said rules.

Roscoe S. Wilkey